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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MAUREEN FLAHERTY, Plaintiff and Respondent, v. VINCENT JORDAN, Defendant and Appellant.	B206526 (Los Angeles County Super. Ct. No. BC311250)

APPEAL from an order of the Superior Court of Los Angeles County, Judith C. Chirlin, Judge. Affirmed.

Forgie & Leonard and Arthur A. Leonard for Defendant and Appellant.

Krieger & Krieger, Terrence B. Krieger and Linda Guthmann Krieger for Plaintiff and Respondent.

INTRODUCTION

Defendant Vincent Jordan appeals from an order denying his motion to vacate a default judgment entered against him in a suit brought by plaintiff Maureen Flaherty. Jordan claims that the order was erroneous and that the trial court should have vacated the default judgment because plaintiff's service of a statement of damages, which was required before entry of a default and default judgment, was defective and invalid. We find that substantial evidence supports the trial court's finding that service of the statement of damages complied with statutory requirements, and affirm the order denying Jordan's motion to vacate the default judgment.

FACTUAL AND PROCEDURAL HISTORY

On February 26, 2004, plaintiff Maureen Flaherty filed a complaint against Vincent Jordan, two other individual defendants, and the Downtown Blue Café, Inc. (Blue Café). As against Jordan, the complaint alleged causes of action for sexual harassment, retaliation for opposing harassment, intentional infliction of emotional distress, and negligent infliction of emotional distress. The complaint alleged that Flaherty, while employed as a waitress at Blue Café, was sexually harassed by Jordan and other defendants employed by Blue Café in managerial or supervisory positions.

On July 23, 2004, Flaherty filed a diligence declaration showing four attempts at personal service of a statement of damages on Jordan at his business location on July 5, 6, 9, and 12, 2004; substituted service of the statement of damages on Jordan by leaving a copy of documents with an employee ("Jane Doe, bartender") at the Blue Café, located at 210 Promenade N., in Long Beach; and service of the statement of damages by mailing a copy of those documents to Jordan at that address. On August 27, 2004, Flaherty filed a request for entry of default against Jordan. Default was entered as requested. Copies of the request for entry of default were mailed to Jordan at 1649 Miracosta Street, San Pedro, California, and care of Downtown Blue Café, Inc. 210 Promenade N., Long Beach, California.

On January 13, 2005, judgment by court after default was entered against Jordan and two other individual defendants for $429,697, interest of $4,631, and attorney's fees of $33,949, and costs of $632.

On December 6, 2007, Jordan filed a motion to vacate the default and default judgment against Jordan on the grounds that the default and default judgment against him were void. Jordan's motion claimed, first, that he was never served with the summons and complaint and that the proof of service of the summons and complaint falsely stated that personal service of the summons and complaint was made. Second, Jordan claimed he was never served with the statement of damages, which also rendered the default and default judgment against him void; that the person upon whom substituted service was made, an employee ("Jane Doe, bartender") was not authorized to accept service and the address of service of the statement of damages by mail was to a business that Jordan had not been associated with since May 10, 2003. Jordan claimed he did not have actual notice of this action until October 2, 2007, when his checking account was levied against. Jordan's declaration supported his motion.

Flaherty's opposition claimed Jordan was personally served with the summons and complaint; that Jordan was served by mail with a request for entry of default on July 22, 2004, and again on August 22, 2004; that Jordan was the registered agent for service of process for Blue Café until December 2004; and that Jordan was not truthful when claiming he had no knowledge of Flaherty's lawsuit until October 2007 or that he had no relationship with Blue Café after May 10, 2003.

On January 17, 2008, the trial court denied Jordan's motion to vacate default judgment.

On March 13, 2008, Jordan filed a timely notice of appeal from the order denying his motion to vacate default judgment, which is an appealable order (*Tunis v. Barrow* (1986) 184 Cal.App.3d 1069, 1074-1075).

ISSUES

Jordan claims on appeal that:

1. Service of a statement of damages was required before entry of default or default judgment;

2. A statement of damages must be served in the same manner as a summons and proof of the service required;

3. The proof of service establishes that service was not sufficient and the proof of service is not sufficient; and

4. The default and default judgment are void on their face and should have been set aside.

DISCUSSION

1. *Flaherty Was Required to Serve a Statement of Damages Before a Judgment of Default Could Be Entered Against Jordan*

Code of Civil Procedure section 425.11, subdivision (b)[1] states that when a complaint is filed in an action to recover damages for personal injury, the defendant may serve on plaintiff a request for a statement setting forth the nature and amount of damages being sought. Section 425.11, subdivision (c) states: "If no request is made for the statement referred to in subdivision (b), the plaintiff shall serve the statement on the defendant before a default may be taken." Section 425.11, subdivision (d)(1) states that if a party has not appeared in the action, the subdivision (b) statement of damages "shall be served in the same manner as a summons."

Flaherty's complaint alleged that defendants' sexual harassment caused her to became physically sick with depression, sleeplessness, headaches, stomach aches, and insomnia, and to sustain physical injuries, pain and suffering, and mental anguish. Complying with section 425.10, subdivision (b), the complaint's demand for damages did not state the amount of damages sought. Thus Flaherty was required to serve the statement of damages required by section 425.11, subdivision (b) before Jordan's default could be entered. (*Schwab v. Rondel Homes, Inc*. (1991) 53 Cal.3d 428, 435.)

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[1] Unless otherwise specified, statutes in this opinion will refer to the Code of Civil Procedure.

2. *Denial of Jordan's Motion to Vacate the Default Judgment Was Not an Abuse of Discretion*

The main question in this appeal is whether Flaherty complied with section 425.11, subdivision (d)(1) and served the statement of damages "in the same manner as a summons." (*Ibid*.)

A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. (§ 415.10.) "If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, . . . a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. . . ." (§ 415.20, subd. (b).)

On July 23, 2004, Flaherty filed a proof of service of the statement of damages on defendant Jordan and an accompanying diligence declaration by the process server, Bob Shultz. Shultz declared that he made four unsuccessful attempts to serve Jordan at a business at 210 Promenade N., Long Beach, California on July 5, July 6, July 9, and July 12, 2004. On July 14, 2004, Schultz made substituted on Jordan by leaving a copy of the statement of damages with "Jane Doe, bartender, 28YR, 5'5, 115LB, LONG BRN HAIR," at 210 Promenade N., Long Beach, California. On July 16, 2004, Shultz mailed a copy of the statement of damages to Jordan at that address.

Jordan asserts that on July 14 and 16, 2004, he no longer worked at Blue Café and had no connection with that address after May 10, 2003, and therefore 210 Promenade N., Long Beach was not his usual place of business. A declaration from the process server, Robert Shultz, supporting Flaherty's opposition to Jordan's motion to vacate

stated that on his unsuccessful attempts to serve the statement of damages on Jordan, he was not informed that Jordan no longer worked at Blue Café. Shultz's declaration further stated that on his fifth, July 14, 2004, attempt to serve Jordan with the statement of damages, the bartender informed him Jordan was upstairs in his office but would not come downstairs to be served. Accordingly Shultz left copies of the documents with the on-duty bartender, and informed her of the contents of the packages and that they were to be delivered to Jordan. Flaherty also provided evidence that Jordan was the registered agent for service of process for Blue Café from May 5, 1992, until December 2004.

The trial court disbelieved Jordan's statements about his having no connection with Blue Café or 210 Promenade N. in Long Beach, and credited Shultz's statements about being told that Jordan was upstairs at that location and would not come downstairs to be served. The trial court was entitled to evaluate conflicting evidence, could disbelieve and reject witnesses' testimony, and was the exclusive judge of witnesses' credibility. (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243, overruled on other grounds in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 287).) Where the evidence supports differing inferences, this court does not disturb the trial court's choice of inferences. (*Ibid.*; *Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) Here substantial evidence and inferences drawn therefrom support the trial court's finding that service of the statement of damages complied with section 415.20, subdivision (b).

Jordan also argues that Flaherty failed to comply with section 417.10, subdivision (a), which requires that proof that a summons was served on a person must be made, "[i]f served under Section 415.10, 415.20, or 415.30, by the affidavit of the person making the service showing the time, place, and manner of service and facts showing that the service was made in accordance with this chapter. The affidavit shall recite or in other manner show the name of the person to whom a copy of the summons and of the complaint were delivered, and, if appropriate, his or her title or the capacity in which he or she is served . . . ." Jordan's motion to vacate the default and default judgment failed to raise this issue in the trial court, and therefore Jordan forfeits that claim of error on appeal.

(*City of San Diego v. D.R. Horton San Diego Holding Co., Inc*. (2005) 1l26 Cal.App.4th 668, 685.)

We conclude that there was no abuse of discretion in the trial court's denial of Jordan's motion.

DISPOSITION

The order is affirmed. Costs on appeal are awarded to plaintiff Maureen Flaherty.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.